

Children's Law Center of Indiana



Custody and Parenting Time

3/19/12

In **In Re Paternity of C.S.**, 964 N.E.2d 879 (Ind. Ct. App. 2012), the Court affirmed the trial court's order granting a petition for modification of custody filed by Father. The issues addressed on appeal were whether the trial court abused its discretion in finding that a substantial change in circumstances warranted a change in custody; whether the trial court's order contravened IC 31-17-2-8; and whether the trial court erred in relying on an updated custody evaluation. *Id.* at 880. The Court held that the trial court did not abuse its discretion in finding that the child's mental and academic growth constituted a substantial change in circumstances warranting a change in custody, that the trial court did not misinterpret IC 31-17-2-8, and that the trial court did not err in relying on the updated custody evaluation. *Id.* at 886.

Mother and Father were both in military service when they began dating and they had a son in February 2006 when they were living in Bloomington. Mother began attending Indiana University while on inactive status with the Army. Father had also obtained a job nearby. However, in 2007, Mother re-enlisted and was deployed to Iraq. Mother's and Father's relationship ended at this time. When Mother returned, she continued her education and Father continued his same employment. In July 2009, Mother and Father entered into an agreed entry to share joint legal and equal physical custody of the child. When Mother received her degree, she took a position at Fort Knox in Kentucky as an Army Reserve Career Counselor on active reserve duty. This was a non-deployable position. In May 2010, Mother filed a notice of intent to relocate and requested that the child be allowed to relocate with her, and that the current parenting time schedule continue until the child began school. Both Mother and Father had acknowledged that the child would begin school in 2011. Father filed a request for custody of the child, noting that there was a substantial change in circumstances, and that the joint custody arrangement could not continue given the distance of approximately two and one half hours between Mother's and Father's homes. After a July 2011 hearing on Father's petition, the trial court granted Father's petition and ordered that Father would exercise primary physical custody so that the child could begin school at the beginning of the 2011-2012 school year. The trial court found that the parties agreed that the child was ready to begin kindergarten, but in spite of this readiness, Mother changed her mind about the child beginning kindergarten. Mother asserted the following plans for the child: (a) the child should not start in kindergarten for another year and that the current custody arrangement should be maintained until the child was seven years old; or (b) the child should begin kindergarten in both Kentucky and Indiana on alternating weeks and the current custody arrangement should be maintained; or (c) if custody is modified, Mother should have primary physical custody. Some of the other relevant findings of

the trial court were that (1) the child had significant family and friend connections where Father lived and where the child spent most of his life; (2) Father had a stable, flexible, job; and (3) in an updated custody evaluation, the custody evaluator recommended that Father have primary physical custody.

The Court held that there was a substantial change that warranted a change in physical custody; the child's academic needs had substantially changed, as the child had reached an age and developmental stage that warranted a change in custody, and the change was in the child's best interests. *Id.* at 884. The Court affirmed the trial court's conclusion that such a change was in the child's best interests. *Id.* Mother argued that the trial court abused its discretion in concluding that this was a substantial change in circumstances that warranted a change in custody; Mother based her argument on there being "no Indiana case law that 'supports the proposition that the mere fact of a child being eligible to attend school, but not yet attending school, is a change so substantial as to warrant modification of custody.'" *Id.* at 883-84. Mother also argued that there could be no substantial change in circumstances regarding education, because school attendance in Indiana is not required until a child reaches seven years of age. *Id.* at 884. The Court noted that IC 31-14-13-6 provides that a court may modify a custody order if the modification is in the best interests of the child and there is a substantial change in one or more of the factors laid out in IC 31-14-13-2.2. *Id.* [Note that the parties and trial court cited IC 31-17-2-21 and IC 31-17-2-8, but IC 31-14 citations apply because this is a paternity case.] Both parents had agreed to start the child in kindergarten; although Mother changed her mind as the time approached, both Mother and Father testified that the child was at an age and developmental stage that made starting kindergarten a good option for him. *Id.* The child had "mastered" the pre-kindergarten programs he had been offered. *Id.* The Court concluded, "In short, [the child's] academic needs and abilities have substantially changed, and he has reached an age and developmental stage that warrants a change in physical custody... such a change is clearly in [the child's] best interests." *Id.*

The Court held that Mother's service in the military did not demonstrate the impermanency contemplated by IC 31-17-2-21.3. *Id.* at 885. IC 31-17-2-21.3 [Parent's active duty service not a factor; temporary modification of custody] provides that "(a) A court may not consider a parent's absence or relocation due to active duty service as a factor in determining custody or permanently modifying a child custody order. (b) If a court temporarily modifies a custody order due to a parent's active duty service, the order temporarily modifying the custody order terminates automatically not later than ten (10) days after the date the parent notifies the temporary custodian in writing that the parent has returned from active duty service. This subsection does not prevent a court from modifying a child custody order as provided under this article after a parent returns from active duty service." *Id.* at 884 (citing IC 31-17-2-21.3). The trial court concluded that this statute did not apply to Mother, as the statute was intended to prevent a military person from losing custody of his or her child while serving the country. *Id.* at 885. Mother's new job would not make her temporarily unavailable to parent her child; in fact, the job was non-deployable, and she was ready and able to remain the primary parent of the child. *Id.* The Court held that the trial court's conclusion on this point was correct, in that the statute contemplates that the custodial parent's military duties are temporary, and Mother's new duties were not temporary. *Id.* "Thus, her service does not demonstrate the impermanency contemplated by the statute." *Id.*

The Court held that Mother waived her objections to the trial court's consideration of the updated custody report. Id. at 886. Mother did not show that she objected to the trial court's use of the evaluation, as the first time she raised the issue of the updated custody evaluation was upon appeal. Id. The Court also noted that, waiver notwithstanding, Mother could not have prevailed on this issue, because Mother was asking the Court to reweigh the evidence. Id.